IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.277 OF 1985

1.Shaikh Adam Ibrahim Mhaldar
(since deceased through his heirs) & Ors. ...Appellants

vs.

1.Shaikh Abdulla Sk. Usman & Ors. ...Respondents

Mrs. S.S.Gokhale for the Appellants
Mr.V.S.Gokhale for Respondent Nos.8-A to 8E, 9,10,11 & 13

CORAM: A.S.OKA,J.
DATE : NOVEMBER 28,2007.

ORAL JUDGMENT:

1. Heard learned Advocate appearing for the Appellants who are the unsuccessful plaintiffs. The plaintiffs filed a suit for declaration and injunction. The case of the plaintiffs in brief is that plaintiffs 1 to 4 are the real brothers, and the plaintiffs No.5 to 7 are their sisters. The name of their father is Shaikh Ibrahim. The Plaintiff No.8 is the mother of the plaintiff Nos.1 to 7. According to the case of the plaintiffs their original ancestor was having one daughter by the name Sharifabi who died leaving behind her two children by name Adam and Jamila. It is stated that the said children are not traceable for 25 years and more. It is stated that the family of the plaintiffs is of Mhaldars of the erstwhile State of Sawantwadi. The case of the plaintiffs is that they are in actual and physical possession of the suit property.

2. According to the case of the plaintiffs, one Shaikh Rehman was acting as a guardian of their (1st to 7th plaintiffs')

father during the minority of their father. Plaintiff Nos.1 to 7 and the Defendant Nos.10 to 13 are the grand children of said Rehman and the said Rehman was the father of the defendant Nos.7 to 9. According to the case of the plaintiffs, the said Rehman was having one daughter by name Fatima. However, the plaintiffs were not aware whether the deceased Fatima had any issue. The said Rehman was looking after the suit property though the actual possession was with the family members of the plaintiffs. In the alternative, a case is made out by the plaintiffs that they have become owners of the suit property by adverse possession. It is contended that the name of the said Rehman was entered in the municipal record only in his capacity as the guardian of the deceased father of the plaintiff Nos.1 to 7. The prayer is for declaration of the ownership and for perpetual injunction.

3. The original defendant Nos.7,8, 10 to 13 as well as legal representatives of defendant No.3 filed the written statement supporting the case of the plaintiffs. Defendant Nos.1 to 6 and 9 filed the written statement contesting the case of the plaintiffs. Their case is that Shaikh Rehman was having a daughter by name Sharifa who was survived by Jamila and Adam and the said Jamila and Adam were very much alive. It is contended that the said Rehman never acted as a guardian during the minority of said Ibrahim. It is contended that the plaintiffs and the defendants are from same family and the suit property is being jointly owned by them. It is contended

that during the partition, the suit property went to the share of the said Rehman and he built the suit house. According to the case of the said defendants, the plaintiffs were never in exclusive possession of the suit property and they cannot claim exclusive ownership. It is submitted that only because Boat Khat continued in the name of the family of the plaintiffs, they are claiming exclusive title to the suit property.

4. The trial court framed various issues. The trial court held that the plaintiffs have failed to prove their exclusive possession and title over the suit property. The trial court accepted the case made out by the contesting defendants that the suit land was allotted to the share of the said Rehman and he built the suit house 70 years prior to the date of institution of the suit. The trial court did not accept the case made out by the contesting defendants regarding perfection of their title by adverse possession. Therefore, the trial court proceeded to dismissed the suit.

5. In the Appeal preferred by the plaintiffs, though the decree passed by the trial court was confirmed, the Appellate Court held that the plaintiffs have some share in the suit house and they are in possession of a portion of the suit house. The Appellate Court found that their possession of the suit house was jointly with the defendants.

6. The Second Appeal was admitted on 27th August 1987. While admitting the Appeal, this Court observed that there was no evidence to show that any of the defendants were in possession of the suit property and therefore, it follows that the plaintiffs were in exclusive possession. This court observed that hence burden should have been put on the Defendants to file a suit for partition and separate possession of their share in the suit property.

7. The submission of the Appellants is that the grand father of the defendant Nos.1 to 3 was looking after the property as the father of the plaintiffs No.1 to 7 was a minor. It is submitted that therefore none of the defendants could have claimed any title in respect of the suit property. She submitted that in absence of any evidence on record to show that any of the defendants were in possession or were having any share in the suit property, the courts below ought to have decreed the suit.

8. I have considered the submissions. The finding of the Appellate court is that the plaintiffs have not proved their exclusive title. The Appellate Court has referred to the admitted position that plaintiff No.9 admitted that Shaikh Rehman was her father and there is a tomb of Shaikh Rehman outside the suit property. The Appellate Court has referred to the documentary evidence on record to show that right from 1933, the name of the father of the defendant Nos.1 to 6

appeared in the record. The Appellate court has referred to the statements recorded in the city survey enquiry. The Appellate Court found that in the city survey enquiry, the statement of the second defendant was recorded and after enquiry, his name was recorded as the holder of the suit property. The Plaintiff Nos.4 and 9 were examined and they admitted that they never complained about the entry of the name of the second defendant. Considering the documentary evidence on record the Appellate court observed that the plaintiffs have failed to prove their exclusive title. I find no infirmity in the said findings of fact which are based on oral and documentary evidence on record.

9. In the suit the Appellants contended that they were in the exclusive possession of the suit property only on the basis of their exclusive ownership. Once it is held that the Appellants-plaintiffs are not the exclusive owners, it is obvious that they are not entitled to relief of perpetual injunction against the defendants who are also having a right, title and interest in the suit property. Therefore, considering the frame of the suit, the courts below and especially the Appellate court was justified in declining to grant relief of declaration. There is no merit in the Appeal and the same is dismissed with no order as to costs.

JUDGE